Court No. 7

IN THE HIGH COURT OF UTTARAKHAND AT NAINITAL

Criminal Appeal No. 1705 of 2001

(Old Case No. 1584 of 1992)

Hari Bahadur
Son of Shri Kaloo,
Resident of Village Himrol,
Patti Mugarsanti,
Tehsil Purola,
District Uttarakashi .....Appellant

Versus

State of U.P. ....Opposite Party

Sri Lokendra Dobhal, learned counsel for the appellant.
Sri Harish Pujari, learned Addl. G.A. for the State.

Dated: 25.09.2007

Hon'ble Dharma Veer, J.

This criminal appeal has been preferred under Section 374 (2) of the Code of Criminal Procedure, 1973 (hereinafter referred to as Cr.P.C.) against the judgment and order dated 13.07.1992 passed by Sessions Judge, Uttarkashi in Sessions Trial No. 24 of 1991, State v. Hari Bahadur, whereby the learned Sessions Judge has convicted appellant Hari Bahadur for the offence punishable under Section 363 of The Indian Penal Code, 1860 (hereinafter referred to as IPC) and awarded a sentence of four years' rigorous imprisonment and fine of Rs. 1,000/- and further directed that in default of fine the accused-appellant has to further undergo rigorous imprisonment for six months.

2. In brief, the prosecution case is that present appellant Hari Bhadur had taken Km. Sheetal aged

about 14 years without her consent and without the consent of her father and she was living with the present appellant Hari Bhadur at his residence. With the same averment, the FIR was lodged by Ganesh Bahadur, father of the victim km. Sheetal, on 24.04.1990 at Patwari-Darso, that report is Ex.Ka-1. On the basis of this FIR, a *Chik* FIR was prepared i.e. Ex.Ka-3. The said incident had taken place in the month of *Chait* as per Hindi calendar, which relates to the month of March in English calendar. The investigation of the case was done by the Patwari Circle Darso (in the rural areas of hill Districts of Uttarakhand the Patwaris are vested with the police powers). Km. Sheetal was recovered by the Investigating officer on 25.04.1990 and the recovery memo was prepared i.e. Ex.Ka-5 Km. Sheetal was medically examined by the Medical Officer, Emergency Hospital, Uttarkashi on 27.04.1990 at 10.45 AM that report is Ex.Ka-2 X-ray report was also prepared i.e. Ex.Ka-9. The Chief Medical Officer has given a certificate about the opinion of the age of victim Sheetal that certificate is Ex.Ka-10. After completing the investigation the Investigating officer of the Patwari concerned has submitted the charge sheet in the Court of Chief Judicial Magistrate, Uttarkashi.

3. Learned Chief Judicial Magistrate committed the case to the Court of Session under Section 209 Cr.P.C. after complying the provisions of Seciton 207 Cr.P.C.

4. Learned Sessions Judge framed charges against appellant Hari Bahadur under Section 366-A & 376 IPC on 25.09.1991 and the charges were read over

And explained to the appellant who pleaded not guilty and claimed to be tried.

5. To prove its case the prosecution examined P.W.1 Ganesh Bahadur, P.W.2 Km. Sheetal (victim), P.W.3 Dr. Usha Rawat, P.W.4 Chait Singh, Patwari (Investigating Officer) and P.W.5 Dr. Ajit Garola. After that the statement of the appellant Hari Bahadur was recorded under section 313 Cr.P.C., who denied the allegations made against him and in defence he has produced D.W.1 Lal Bahadur.

6. After appreciating the evidence on record and hearing learned counsel for both the parties, the learned Sessions Judge has convicted appellant Hari Bahadur for the offence punishable under Section 363 IPC and awarded a sentence of four years' rigorous imprisonment and fine of Rs.1,000/- and further directed that in default of fine the accused-appellant has to further undergo rigorous imprisonment for six months.

7. Against the said judgment and order, the appellant has preferred the present appeal before this Court.

8. I have heard Sri Lokendra Dobhal, learned counsel for the appellant and Sri Harish Pujari, Learned Additional government Advocate for the State and perused the entire record of the trial court as well as the instant appeal.

9. To prove its case the prosecution has examined P.W.1 Ganesh Bahadur, who has stated that

Km. Sheetal is his daughter and appellant Hari Bahadur was known to him before the incident and the appellant lived at Khal-Thata. He occasionally used to come his house. The incident had taken place about two years before in the month of *Chait*. He was sowing potato in the garden. He came back in the evening after sowing the potato along with his wife Teji, daughter Sheetal and sons Kaley Bahadur and Teeka Ram. After that his daughter Sheetal went to the house of Devi Sing, who is brother-in-law of Sheetal, to take wool but she did not return the house. Next morning, he went to search Sheetal at the house of Devi Singh then Devi Singh told him that Sheetal had gone back to her house yesterday evening. Thereafter, he searched Sheetal in so many places for about one month but he could not get Sheetal and the appellant Hari Bhadur was also not at his residence. One Kiran Bahadur told him that Sheetal was at the residence of appellant Hari Bhadur, then in the morning he went to the house of Hari Bhadur where his daughter told him that Hari Bhadur had taken her forcibly and committed rape with her and also told him that she did not want to live with Hari Bahadur. Thereafter he lodged the report to Patwari Chawki, that report is Ex.Ka-1. Next day, he along with Patwari went to the residence of Hari Bahadur and from there Hari Bahadur and Sheetal were taken to the Patwari Chauki. Next day, victim Sheetal was medically examined in the District Hospital, Uttarkashi. After the medical examination Sheetal was given to his *Supurdagi*. He has further stated that the age of Sheetal was 14 years at the time of incident. This witness was cross-examined by the defence counsel at length but nothing has come out from

his evidence, which may create any doubt. The evidence of this witness is reliable and believable.

10. P.W.2 is victim, Km. Sheetal, who has stated in her statement that the incident had taken place about two years before in the month of *Chait*. She had gone to the house of her brother-in-law to take wool at about 5.00 PM. While returning to her house she was caught hold by the accused-appellant Hari Bahadur in the way and the she was dragged. On resistance and making noise, Hari Bahadur threatened her that he would kill her and Hari Bahadur took her to the house of one Lal Bahadur, where she was kept for three days and rape was committed with her forcibly. Thereafter, she and accused-appellant came to Nalupani where they stayed for three days and at Nalupani the accused applicant also committed rape with her. After that Hari Bahadur took her to Gyansu, Uttarkashi where she was forced to live for one month. Subsequently, Kalu Ram, father of the appellant, came there and stated that a compromise had taken place with Ganesh Bahadur, father of victim Sheetal, as such, they should go to their home. Consequently, all of them came to the house of Hari Bahadur at Kalthata where on coming of her father Ganesh Bahadur, she narrated this fact to her father. Next day, her father along with the Patwari came and Hari Bahadur as well as she was taken to Patwari Chauki, from where she was sent to District Hospital, Uttarkashi where she was medically examined by the Medical Officer of the Hospital. She has also stated that on the date of incident she was about 13 years old and Hari Bahadur took her forcibly without her consent. This witness was cross-examined by the defence counsel at

Length but nothing has come out from her evidence, which may create any doubt. The evidence of this witness is reliable and believable.

11. P.W.3 is Dr. Usha Rawat, who has stated in her stated that on 27.04.1990 she was posted as a Woman Medical Officer in the District Hospital, Uttarkashi. On that date, Km. Sheetal was brought by Chait Singh Nath, Patwari for medical examination and Km. Sheetal was medically examined by her on the same day at 10.45 AM. At the time of medical examination, she found the following facts:-

> " Vaginal examination: Pelvic Hair developed. Lavia minor and major developed well. Hymen ruptured.
> P/V-two fingers easily inserted through vagina. No external injuries. Uterus six week size. OS close. Antiverted. No discharged.
> Breast-well developed. Areola pink. Auxilary hair present."

12. P.W.3, the Doctor has also given her opinion that the victim was habitual of sexual intercourse and she may be pregnant. For the determination of her age she was referred to the Chief Medical Officer. The injuries found on the body of victim Sheetal were of 4-5 days prior to the mecial examination. She has prepared medical report at the time of medical examination, that report it Ex.Ka.-2.

13. P.W.4 Chait Singh Nath, Patwasri, who is Investigation Officer of the case. He has stated from April 1990 to June 1990, he was posted as Patwary at Darso Chauki. He has investigated the above said case and he started the investigation on 24.04.1990. Ganesh

Bahadur submitted the written report on 24.04.1990 at 4.00 PM. On the basis of this report, he prepared a *Chik* FIR i.e. Ka.Ka-3. The entry was made in the G.D. i.e.Ex.Ka-4. On 25.04.1990 Km. Sheetal was recovered by him and the accused was also arrested by him at the same day. The recovery memo of Km. Sheetal was prepared by him, that recovery memo is Ex.Ka.-5. The site plan of the place of recovery was also preared by him., i.e. Ex.Ka-6. The site plan of the place of incident from where the appellant had taken the victim was also prepared by him i.e.Ex.Kat-7. During the course of the investigation he recorded the statements of the witnesses and the victim. The victim was medically examined by the Medical Officer concerned of the District Hospital, Uttarkashi on 27.04.1990. After completing the investigation he has submitted the charge sheet against appellant Hari Bahadur on 04.06.1990 i.e. Ex.Ka-8.

14. P.W. is Dr. Ajit Garola, who has stated in his statement that on 10.05.1990 he was posted as Medical Officer, District Hospital, Uttarkashi. On that day Km. Sheetal was brought to him for X-ray. The X-ray was conducted in his supervision and the report was prepared by him, that X-ray report is Ex.Ka-9. The age certificate was prepared by Sri S.K. Gupta, Chief Medical Officer, Uttarkashi, i.e. Ex.Ka-10. He has identified the signature of Sri S.K. Gupta.

15. After that the statement of accused-appellant was recorded under Section 313 Cr.P.C. who denied the allegations made against him but could not produce any documentary evidence in his defence. As oral evidence, the appellant has produced D.W.1 Lal Bhadur, who has

Stated in his statement that he knows Devi Singh. Devi Singh has been working in the garden of one Hukam Singh for 5-6 yeas. Devi Singh has been there and in that period he did not go anywhere. He has further that stated that he has also been working in the garden of one Atar Singh continuously and has never gone anywhere leaving his job before today. He has further stated that he knows Hari Bhadur, who has been working in the garden of one Himraul Lakhiram and he also knows Sheetal Dvei, the daughter of Ganesh Bahadur. Further statement is that Hari Bahadur never brought Km. Sheetal to his house and neither Sheetal was kept in his house at any point of time, nor did Patwari ever enquire about her. We, Ganesh Bahadur, Devi Singh and Hari Singh, are *Gorkhas*. There was a dispute occurred between Hari Bhadur and Ganesh Bahadur prior to the month of *Chait*. Hari Bahadur never went leaving his job from *Chait* and Hari Bahadur has been visiting him frequently.

16. As per the evidence discussed above, it has been proved by the prosecution beyond reasonable doubt that victim Sheetal was taken by the present appellant forcibly from the custody of his father Ganesh Bahadur in March 1990 and at the time of the said incident she was about 13 years as per her statement and she was 14 years as per the statement of her father and as per the report submitted by the Chief Medical Officer, she was about 16 years.

17. Thus from the above said evidence, she was minor a the time of incident and she was taken forcibly without her consent by the present appellant from the

Custody of her father. This fact is proved from the statement of P.W.1 Ganesh Bahadur, P.W.2 Km. Sheetal and supported by the medical evidence given by P.W.3 Dr. Usha Rawat and P.W.-5 Ajit Garola and the medical certificates i.e. Ex.Ka.2, Ex.Ka-9 & Ex.Ka-10. Accordingly, the prosecution has proved its case beyond reasonable doubt against the present appellant under Section 363 IPC. Learned Sessons Judge has rightly convicted the appellant under Section 363 IPC. The judgment and order of the learned Sessions Judge is justified as per the evidence discussed above and is on record.

18. I am in full agreement with the judgment and order passed by the learned Sessions Judge convicting and sentencing the appellant for the offence punishable under Section 363 IPC.

19. Sri Lokendra Dobhal, learned counsel for the appellant has submitted that judgment and order dated 13.07.1992 passed by the learned Sessions Judge convicting appellant Hari Bahadur for the offence punishable under Section 363 of IPC as well as sentence of four years' R.I. and fine of Rs. 1,000/- and in default of fine the accused-appellant has to further undergo six months R.I. is justified, as per the law on the basis of evidence on record.

20. Learned counsel for the appellant has further submitted that appellant Hari Bahadur has served out the sentence of four years' R.I. and has also deposited the fine of Rs. 1,000/- as awarded by the learned Sessions Judge in the impugned order.

21. Learned Chief Judicial Magistrate, Uttarkashi has submitted report dated 12.07.2007 stating therein that convicted prisoner Hari Bahadur, son of Kalu, resident of Hirola, District Uttarkashi, S.T. No.24/91, under Section 363 IPC has been released from jail on 15.01.1995 after undergoing the sentence of four years. It has further been stated that prisoner Hari Bahadur has deposited the fine of Rs. 1,000/- on 05.12.1994 in the court below.

22. In view of the above said discussions, the appeal is devoid of merits and is hereby dismissed.

(Dharam Veer, J.)

25.09.2007
RBS